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No. 05-1574

In the Supreme Court of the United States

IGNACIO SERGIO ACOSTA,
Petitioner,

v.

STATE OF TEXAS
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals Eighth District of Texas, El Paso, Texas

PETITIONER'S REPLY BRIEF

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PARTIES TO THE PROCEEDINGS

Petitioner: Ignacio Sergio Acosta is the defendant in the underlying criminal case.

Respondent: The State of Texas, by the El Paso County District Attorney, is prosecuting Petitioner Acosta.

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I

INTRODUCTION

Petitioner filed his Petition for Writ of Certiorari with this Court on June 7, 2006. The issue is whether a Texas state statute prohibiting one person from transferring a dildo to another person violates the Ninth Amendment and the substantive Due Process Clause of the Fourteenth Amendment.

On July 27, 2006 this Court requested a response from the El Paso District Attorney. On August 16, 2006 the El Pasto District Attorney filed his opposition to the Petition. The opposition argues the merits of the case on behalf of the State of Texas. It does not address specifically the more narrow issue of whether this Court should take the case and decide it on its merits.

This Reply is being filed pursuant to Supreme Court Rule 15(5).

II

ARGUMENT

A. Certiorari Should Be Granted Because This Case Squarely Presents An Issue Left Undecided By This Court

Respondent State of Texas relies heavily upon the Eleventh Circuit's decision in Williams v. Attorney General of Alabama, 378 F.3d 1232 (11th Cir. 2004), cert.den., Williams v. King, 543 U.S. 1152, 125 S.Ct. 1335, 161 L.Ed.2d 115 (2005). In the Williams case the Eleventh

Circuit split two to one on the issue of whether the Alabama statute, identical to the Texas statute at issue here, violated substantive due process. The Eleventh Circuit reversed the District Court's decision that the Alabama statute in question did violate substantive due process.

However, on the more narrow issue of whether this Court should grant certiorari to resolve the issue, the Eleventh Circuit acknowledged that the issue was not squarely resolved by this Court in Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

The Eleventh Circuit in the Williams case acknowledged that this Court has left the issue open "for another day." The Eleventh Circuit stated in Williams v. Attorney General, supra, 378 F.3d at 1238:

> "In short, we decline to extrapolate from Lawrence and its dicta a right to sexual privacy triggering strict scrutiny. To do so would be to impose a fundamental – rights interpretation on a decision that rested on rational – basis grounds, that never engaged in Glucksberg analysis, and that never invoked strict scrutiny. Moreover, it would be answering questions that the Lawrence Court appears to have left for another day. Of course, the Court may in due course expand Lawrence's precedent in the direction anticipated by the dissent. But for us preemptively to take that step would exceed our mandate as a lower Court."

Accordingly, even the decision upon which Respondent bases its opposition to the Certiorari Petition recognized that

the issue is [illegible]. Prior denials of certiorari are not to be given weight with respect to the question of whether this Court should take a particular case for review.

In Frazer v. California, 529 U.S. 1108, 120 S.Ct. 1960, 146 L.Ed.2d 792 (2000), this Court unanimously declined to review the decision of the California Supreme Court in People v. Frazer, 21 Cal.4th 737, 88 Cal.Rptr. 312; 982 P.2d 180 (1999) which held that the State of California did not violate the ex post facto clause by retroactively extending the statute of limitations in certain cases where the statute had already expired. After denying a Petition for Writ of Certiorari filed to review the decision of the California Supreme Court on this issue this Court then granted certiorari to review the same issue that was decided by the California Court of Appeal, where the California Supreme Court denied discretionary review based upon the Frazer case. See Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). That this Court initially denied certiorari in the Frazer case did not deter this Court from granting certiorari in the Stogner case. Indeed, not only did this Court grant certiorari in Stogner after denying certiorari in Frazer, it reversed the judgment of the California Court of Appeal in Stogner.

That this Court denied certiorari in the Williams case, therefore, is no bar to the granting of certiorari in this case whether or not the issue presented to this Court in the Williams case was identical to the issue now being presented by Petitioner herein.

B. Petitioner Has Standing To Present The Issue of Sexual Privacy

Respondent argues that this case does not involve the private use of dildos but only whether the State can prohibit commercial sales of dildos. In making this argument Respondent ignores Petitioner's reference to this Court's decision in Carey v. Population Services International, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) discussed by Petitioner at page 22 of his Petition. It is surprising Respondent would argue that Petitioner lacks standing to raise the sexual privacy issue in light of Respondent's reference at page 17 of its Brief in Opposition to the Fifth Circuit's decision in United States v. Coil, 442 F.3d 912 (5th Cir. 2006). In footnote 2 of the Coil decision the Fifth Circuit directly addressed the issue of standing. The Fifth Circuit agreed with the defendant in the Coil case that Mr. Coil did have standing to challenge the constitutionality of the federal statute as a vendor of the adult materials in question. The Fifth Circuit stated in footnote 2,

> "Although the government does not concede that Coil has standing to assert the privacy rights of those [who] would purchase his obscene materials, it does not offer a serious argument to rebut standing. The Supreme Court has consistently upheld the standing of vendors to challenge the constitutionality of statutes on their customers' behalf where those statutes are directed at the activity of the vendors. See, e.g., Carey v. Population Services International, 431 U.S. 678, 682-84, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (holding that a mail order seller of non-medical contraceptives had standing to argue that a

> state statute prohibiting the distribution of non-medical contraceptives violated its customers' substantive due process rights to use such contraceptives); Craig v. Boren, 429 U.S. 190, 195, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (holding that a beer seller had standing to challenge a state statute on behalf of certain under-age customers); see also United States v. Extreme Associates, Inc., 431 F.3d 150, 155 (3rd Cir. 2005) (holding that vendor of obscene materials has standing to challenge federal obscenity statute on behalf of customers)."

Not only does Petitioner have standing to raise the privacy rights of his customers, the Texas statute in question is not restricted to purely commercial sales of sex toys. It prohibits the giving, lending, transferring, or transmitting of a sexual toy. These activities are not restricted to commercial transactions.

If a man may have sex with another man, or if a woman may have sex with another woman, why is it impermissible for one person to have sex with himself or herself. The State has presented no justification for trying to restrict or eliminate masturbation in private. The State tries to justify the statute by suggesting that a customer may use a sex toy for "a bona fide medical or psychiatric reason." This exemption is not broad enough to save the statute from constitutional attack. One should not need a doctor's prescription to masturbate in private.

Respondent suggests that if the Texas statute is invalidated incest, drug taking, prostitution, and bestiality would be unleashed. This is simply not true. There are legitimate reasons for prohibiting prostitution, bestiality, incest, drug

taking and arguably even the distribution of obscene matter. Those activities involve more than one person. The State may have a legitimate interest in prohibiting one person from exploiting another. The making of a pornographic or obscene movie requires or involves more than one person or affects more than one person. On the other hand, stimulating ones self in private affects no one else. The State has no interest in prohibiting or eliminating this sort of activity. That is why the overwhelming majority of states have chosen not to outlaw private self masturbation.

In any event, this Court can address these issues when it hears the case on its merits. This Court should grant certiorari because there are conflicts among the states with respect to the decisions in this area. It is beyond dispute that some states have upheld these sorts of statutes and others have struck them down.

If the State of Texas is so confident that its statute is valid it should welcome review by this Court. A decision upholding the Texas statute in question could lead to the adoption of similar statutes by other states. It may be that what is deterring other states from adopting such statutes is uncertainty over the question as to their constitutionality.

Of course, we do not know whether other states have been deterred from adopting similar statutes because of legal uncertainty over the validity of such statutes or whether the populations in those states simply do not want to regulate this sort of conduct. If there was some substantial need for this sort of statute one would think many of the other states would adopt such statutes. That most states have not adopted such statutes is some indication that there is no basis for doing so.

III

CONCLUSION

The time has come for this Court to resolve the issues presented by the Petition for Writ of Certiorari. Either these sorts of statutes are constitutional or they are not. The lower courts need guidance from this Court. This is an appropriate case for the granting of certiorari. If self masturbation in private can be prohibited presumably the states could ban card playing (e.g. poker) in private, and even solitaire.

Respectfully submitted,

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